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IN THE

Supreme Court of the United States

CSX TRANSPORTATION, INC.,
Petitioner,

v.

STATE BOARD OF EQUALIZATION
of the State of Georgia; Jerry Jackson, as Commissioner of Revenue of the State of Georgia; Russell W. Hinton, as State Auditor of the State of Georgia; and Ray J. Crawford, as Director of the Georgia State Properties Commission,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICUS CURIAE* COUNCIL ON STATE TAXATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

This brief *amicus curiae* in support of petitioner is filed on behalf of the Council On State Taxation ("COST").[1] COST is a non-profit trade association formed in 1969 to promote

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* has made a monetary contribution to the preparation or submission of this brief. Written consent of all parties to the filing of this brief has been filed with the Clerk of this Court.

equitable and nondiscriminatory state and local taxation of multi-jurisdictional business entities. COST represents nearly 600 of the largest multistate businesses in the United States; companies from every industry doing business in every state. While COST's membership includes the major railroad providers, which will be directly impacted by an interpretation of the statutory provision at issue, our broader company membership is concerned about the ramification this case will have on the validity and effectiveness of many other federal laws protecting interstate commerce from discriminatory and unduly burdensome state taxation.

STATEMENT OF THE CASE

In 2002, an appraiser working for the Property Tax Division of the Georgia Department of Revenue adopted a new valuation method to determine the property tax assessment to be made against CSX Transportation, Inc. (CSX). That new method resulted in a 41.3% increase in CSX's tax liability for the year and subjected CSX's property to a higher level of tax than other commercial and industrial property in the State.

CSX challenged Georgia's 2002 discriminatory assessment under Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act" or "the Act"), 49 U.S.C. § 11501 (2002), bringing suit in the United States District Court for the Northern District of Georgia. The suit alleged that Georgia had violated the 4-R Act by assessing the property of CSX at a higher ratio of its true market value than the ratio of assessed value to true market value of other commercial and industrial property, exceeding the 5% threshold in the Act.

The United States District Court for the Northern District of Georgia found that the 4-R Act barred consideration of valuation methodologies different from the methodology used by the State. Instead the court sought to narrowly construe the Act to allow only challenges to the factual determinations

made in employing the state's methodology. A panel of the United States Court of Appeals for the Eleventh Circuit upheld the District Court's decision.

This Court granted certiorari and the parties are briefing the following question: whether, under the federal statute prohibiting state tax discrimination against railroads, 49 U.S.C. § 11501(b)(1), a federal district court determining the "true market value" of railroad property must accept the valuation method chosen by the State.

SUMMARY OF ARGUMENT

For the 4-R Act to have meaning it must be applied to allow taxpayers to litigate the ultimate question relevant to determine whether discrimination exists, that is: what is the true market value of rail transportation property? In turn, litigating this question must, to be effective, encompass an adjudication of the appropriate method necessary to determine the true market value. The Eleventh Circuit's decision to limit litigation to factual components of a state selected methodology neuters the litigation by artificially restricting the challenge to a set of questions that are not necessarily, or even likely, dispositive of the question to be asked under the 4-R Act itself.

The Eleventh Circuit inappropriately applied the clear statement rule to justify its conclusion that Congress did not intend to allow federal courts jurisdiction over matters of state property tax valuation methods. The 4-R Act is unambiguous in its intent to identify and eradicate discrimination against railroad property. It does so in a manner that balances federalism interests while clearly granting taxpayers the ability to challenge discrimination in federal court. The Eleventh Circuit's conclusion that the district court should have jurisdiction over the issue of value but not have the ability to adjudicate how value is determined is a queer reading of the straightforward charge of § 11501. Congress

here did make a clear statement; district courts are able to fully adjudicate challenges to value, including how those values are calculated; the Eleventh Circuit erred in determining that the clear statement rule is violated.

Indeed, the Eleventh Circuit's broad application of the clear statement rule could jeopardize many other federal statutory provisions governing state and local tax. Serving in its role as the protector of interstate commerce, Congress has intervened in the world of state taxation numerous times to establish rules for, clarify, and foster uniformity in state tax treatment of multistate transactions and enterprises. Unless the decision below is corrected, each of these statutory provisions could be put into question by the Eleventh Circuit's broad application of the clear statement rule.

ARGUMENT

I. FAILURE TO READ 49 U.S.C. § 11501(b) & (c) TO GRANT FEDERAL DISTRICT COURTS THE ABILITY TO ADJUDICATE THE METHODOLOGY BEHIND PROPERTY VALUATION WOULD EVISCERATE THE FUNDAMENTAL PURPOSE BEHIND THE STATUTE.

Tiring of complaints regarding "studied and deliberate"[2] state discrimination against railroads, Congress passed the Railroad Revitalization and Regulatory Reform Act in 1976 ("4-R Act" or "the Act"), 49 U.S.C. § 11501 (2002). The Act specifies four prohibited activities which, if done by a state or local taxing authority, are considered to be discriminatory and an unreasonable burden on interstate commerce. The Act does not allow states or localities to:

> (1) Assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed

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[2] S. Rep. No. 87-445, at 458 (1961).

value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) Levy or collect a tax on an assessment that may not be made under paragraph (1) of this subsection.

(3) Levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) Impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part.

49 U.S.C. § 11501(b).

The purpose of these four prohibitions is clear from their language: to prohibit discrimination caused by inflating railroad property assessed values (compared to their true values); to prohibit the levy or collection of tax based on these inflated values; to prohibit discrimination by imposing higher tax rates on railroad property; and to prohibit any other tax that discriminates against railroads. Of these four prohibitions only the first, and Congress' intention in that regard, is relevant to the present case.

Congress sought by § 11501(b)(1) to prohibit sub-national tax jurisdictions from taxing railroad property at a higher value than the tax imposed on non-railroad property. In crafting a statutory formula to determine whether the taxing authority had engaged in discrimination against railroads, Congress chose a comparison approach to see if disparity exists between treatment of railroad and non-railroad property. To make the comparison, one must evaluate the assessed value of railroad property against its true market value. The assessed value is self apparent; determining the true market value is the heart of the investigation and resulting dispute.

As set forth thoroughly in the Brief of Petitioner (pp.6-12), there are numerous methods and combinations of methods which can be used to calculate the true market value for purposes of taxation of property. Because the different valuation methodologies serve different purposes in the valuation process, the use of a method inappropriate to the specific property use or type can produce a valuation that is inapplicable to the actual property involved in the dispute. Using the incorrect method will produce a value that is correct for the method but incorrect for the property. For § 11501(b)(1) to have meaning, and for the formula comparison to be applied effectively by the district court, the court must have the ability to look at the state's chosen methodology to determine whether it is the appropriate method to use given the type and use of the property in question.

Said another way, to evaluate a taxpayer's claim of discrimination under § 11501(b)(1), the Act must anticipate that the district court will reach a decision on each of the elements included in the basic formula laid out in § 11501(b)(1). Those elements include determining the assessed value of the railroad property; the true market value of the railroad property; the assessed value of other commercial/industrial property; and the true market value of the other commercial/industrial property.

The purpose of making these four determinations is so that the railroad property ratio can be compared with the commercial/industrial property ratio. If the railroad ratio exceeds by at least five percent the ratio for commercial/industrial property, the state's assessment violates the 4-R Act and the district court is granted jurisdiction to provide relief. 49 U.S.C. § 11501(c).

This Court recognized the fundamental purpose of § 11501 in *Burlington Northern Railroad v. Oklahoma Tax Commission*, 481 U.S. 454 (1987), where it determined that the statute "permits review by federal courts of alleged over-

valuation of railroad property by state taxation authorities" and recognized that the statute was "Congress' solution to the problem of discriminatory state taxation of railroads." *Id.* at 456-457.

Congress' solution included granting taxpayers the ability to challenge alleged discrimination in the district courts of the United States. While taxpayers have always had the ability to challenge discrimination in their local court system, Congress concluded that the local court systems had proven too biased to effectively address the discrimination and that it was appropriate for Congress, under its express Commerce Clause authority, to put the issue of discriminatory valuation in front of a federal judge. This decision, because of its impact on the federal-state relation, was not made lightly and should not be judicially re-written as has been done by the Eleventh Circuit.

While this Court has previously addressed 4-R Act cases, it specifically noted that it had not addressed the question presented today, stating in *Oklahoma Tax Commission*, "[t]his case therefore does not present the question whether a railroad may, in an action under § 11503 [now § 11501], challenge in the district court the appropriateness of the accounting methods by which the State determined the railroad's value, or is instead restricted to challenging the factual determinations to which the State's preferred accounting methods were applied. Accordingly we express no view on that issue." *Id.* at 463. The Court however otherwise made clear that "assessed value and true market value are subjects for judicial inquiry." *Id.* at 462.

Unfortunately, the Eleventh Circuit's narrow approach to the statute would prevent the district court from determining the true value of the railroad property by prohibiting the district court from looking behind the methodology to determine the appropriate valuation for ratio comparison. This approach results in an interpretation of the 4-R Act that says taxpayers may challenge the value but may not prove that the

value is incorrect. To the listening taxpayer community, the Eleventh Circuit's hollow challenge has the sound of one hand clapping – it sounds to be no challenge at all.

The correct approach was articulated by Judge Fay in his dissent from the Eleventh Circuit's opinion. Judge Fay wrote that, "[t]he language of the statute is straightforward and prohibits states from assessing rail transportation property at a value that has a higher ratio to the true market value than the ratio that the assessed value of other commercial and industrial property has to its true market value." *CSX Transportation, Inc., v. State Board of Equalization*, 472 F.3d 1281 at 1292 (2006). Judge Fay concluded that the objective of any methodology utilized is a determination of true market value and therefore taxpayers should be allowed to challenge the methodology if they can establish that it results in an unacceptably higher tax ratio for railroad property. *Id.* at 1294. The Eleventh Circuit's majority approach instead relegates taxpayers to disputing factual differences with the state's application of its chosen methodology, an exercise which largely blesses the manipulation (and resulting discrimination) that stems from selection of the methodology itself. It is the adoption of valuation methods, not just factual misapplication, that leads to distorted valuation of railroad property. As Judge Fay recognized in his dissent, "if the Act were to be interpreted, [to eliminate methodology challenges], so that the [state] could adopt a special appraisal method for railroads alone, then the whole nondiscrimination objective of the statute could be circumvented." *Id.* Preventing the district court from investigating the resulting distortion is tantamount to blessing it, a decision clearly at odds with the Congressional intent.

This Court's history with the Act supports an interpretation which would give the district court authority to evaluate the underlying methodology. In *Oklahoma Tax Commission*, the state took the position that whatever "the State determines the

value of the railroad to be, the resulting assessment ratio is not subject to further judicial scrutiny in the federal courts." *Okla. Tax*, 481 U.S. at 462. This Court found the state's restrictive thinking (identical in nature to that espoused by Georgia in the present case), to be inconsistent with language in the Act; the Act specifically allocates the burden of proof in determining "assessed value and market value [as] governed by State law." *Id.* Similarly here, the allocation of burden of proof on the question of market value supports the view that district courts were granted jurisdiction to fully determine market value, an exercise which by its nature includes an exploration of the methods involved in determining market value.

II. THE ELEVENTH CIRCUIT MISAPPLIED THE CLEAR STATEMENT RULE.

The Eleventh Circuit misapplied the clear statement rule, relying on this Court's holding in *Department of Revenue v. ACF Industries, Inc.*, 510 U.S. 332 (1994). This Court's ruling in *ACF* does not, as was found to be the case by the Eleventh Circuit, apply to prohibit challenges to valuation methods under § 11501(b)(1). *ACF Industries* involved application of § 11501(b)(4), which prohibits imposition of a separate "tax that discriminates against a rail carrier." 49 U.S.C. § 11501(b)(4). ACF sought to challenge the state's allowance of property tax exemptions for nonrailroad property when such exemptions were not allowed on railroad property. The Court evaluated the taxpayer's argument that the 4-R Act prohibited the state from granting property tax exemptions to nonrailroad property without granting them to railroad property and held that such challenges were not allowed under the Act. This Court's holding in *ACF* can be summarized as prohibiting challenges to property tax exemptions under the 4-R Act because Congress did not express a clear intent to allow such challenges. *ACF Industries*, 510 U.S. at 345.

The present case, on the other hand, involves a straightforward challenge to a discriminatory tax assessment under § 11501(b)(1), raising for consideration the fundamental purpose of the anti-discrimination statute. Unlike the decision in *ACF* where the statutory language never once goes so far as to mention property tax exemptions, Congress expressly raised the question of valuation in the statute. It cannot be believed that challenges to value and the methods used to calculate value were not the clear and manifest purpose of Congress in adopting the language in § 11501(b)(1).

The Eleventh Circuit's application of the clear statement rule to § 11501(b)(1) was based on the fact that "[t]he text of the Act does not clearly state that railroads may challenge valuation methodologies." *CSX Transportation*, 472 F.3d at 1289. It is true that the word methodologies itself does not appear in the statute, but the statute forces a consideration of those methodologies through § 11501(c) which requires the district court to determine whether the state has violated the assessment to market value formula in determining whether the state has engaged in discrimination. Making this determination requires that the court reach a conclusion regarding the true market value of the railroad property. The court cannot make this necessary finding without exercising the ability to evaluate the methodology as an inherent part of the true market value determination. To determine true market value one must consider the underlying facts as well as the method chosen to apply those facts. Eliminating the methodology analysis from the litigation has the impact of limiting the district court to checking on whether the parties have accurately counted the number of track miles or other mundane factual details which are relatively inconsequential in the overall valuation process. Congress could not have intended for its statute prohibiting value based discrimination to not cover the methods necessary to determine value.

III. THE ELEVENTH CIRCUIT'S ABSURD APPLICATION OF THE CLEAR STATEMENT RULE WOULD JEOPARDIZE MANY OTHER FEDERAL STATUTORY PROVISIONS GOVERNING STATE AND LOCAL TAX.

The Eleventh Circuit's broad application of the clear statement rule could jeopardize many other federal statutory provisions governing state and local tax. As seen above, the Eleventh Circuit's approach to the clear statement rule requires that Congress spell out every variable, every possibility, and every nuance of the unlimited variety of possible challenges under the 4-R Act or those challenges will be found to be disallowed by the clear statement rule. This overly strict approach, if applied to other federal legislation impacting state and local tax, could undermine the entire purpose behind such legislation. The clear statement rule should be applied cautiously lest it destroy the intent of Congressional legislation meant to solve significant problems in the state and local tax arena.

Congress has, serving in its role as the protector of interstate commerce, intervened in the world of state taxation numerous times to protect, clarify, and foster uniformity in state tax treatment of multistate transactions and enterprises. These legislative inroads on state sovereignty are limited to circumstances where Congress has heard repeatedly from national stakeholders that the problems existing in our subnational tax structure require a federal solution. Some of the examples of federal legislation that could be eviscerated by the Eleventh Circuit's broad application of the clear statement rule include:

Discriminatory Airline Taxation

This statute prohibits states from levying or collecting a tax on "(1) an individual traveling in air commerce; (2) the transportation of an individual traveling in air commerce;

(3) the sale of air transportation; or (4) the gross receipts from that air commerce or transportation." 49 U.S.C. § 40116(b). The statute also adopts language identical to the prohibition against discrimination found in the 4-R Act. The statute prohibits states from the following acts based on a conclusion that these acts unreasonably burden and discriminate against interstate commerce. States are not permitted to:

> (i) assess air carrier transportation property at a value that has a higher ratio to the true market value of the property than the ratio that the assessed value of other commercial and industrial property of the same type in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.
>
> (ii) levy or collect a tax on an assessment that may not be made under clause (i) of this subparagraph.
>
> (iii) levy or collect an ad valorem property tax on air carrier transportation property at a tax rate greater than the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.
>
> (iv) levy or collect a tax, fee, or charge, first taking effect after August 23, 1994, exclusively upon any business located at a commercial service airport or operating as a permittee of such an airport other than a tax, fee, or charge wholly utilized for airport or aeronautical purposes.

49 U.S.C. § 40116(2)(A).

The language of § 40116(2)(A)(i) is identical to the language at issue in this case under § 11501(b)(1). A ruling in this case will therefore impact the protections Congress afforded airline property under § 40116.

Discriminatory Motor Carrier Taxation

In 1980 Congress adopted language identical to the language of § 11501(b) to protect motor carrier transportation

property from discriminatory taxation. Like § 11501(b), the motor carrier statute prohibits the following acts as discriminatory and burdening interstate commerce.

> (1) Excessive valuation of property.—Assess motor carrier transportation property at a value that has a higher ratio to the true market value of the motor carrier transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.
>
> (2) Tax on assessment.—Levy or collect a tax on an assessment that may not be made under paragraph (1).
>
> (3) Ad valorem tax.—Levy or collect an ad valorem property tax on motor carrier transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

49 U.S.C. § 14502.

The motor carrier provision also allows taxpayers access to the federal district court. A ruling in this case will therefore impact the protections Congress afforded motor carrier transportation property under § 14502.

Employee Retirement Income Security Act

Congress broadly preempted state laws taxing employee benefit plans. 29 U.S.C. § 1001 et seq.

Taxation of Energy Generation

Congress preempted state taxes on or with respect to the generation or transmission of electricity if such tax discriminates against out-of-state manufacturers, producers, wholesales, retailers or consumers of that electricity. The provision does not create federal court review but specifies that a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and

transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce. 15 U.S.C. § 391. *See, Arizona Public Service Co. v. Snead*, 441 U.S. 141 (1979), to compare this Court's analysis of § 391 with the Eleventh Circuit's analysis of 49 U.S.C. § 11501(b) in the present case.

Taxation of Outer Continental Shelf Activities

Congress adopted a broad protection of oil and gas companies from state taxation of their activity on the Outer Continental Shelf. The statute says simply that "State taxation laws shall not apply to the Outer Continental Shelf." 43 U.S.C. § 1333(a)(2).

Prohibition of Superfund Taxes

Congress preempted state taxes whose purpose was to provide "compensation for claims for any costs of response or damages or claims which may be compensated under [the Federal Comprehensive Environmental Response, Compensation, and Liability Act]." 42 U.S.C. § 9614(c).

Prohibition of Income Taxes

Congress preempted state income taxes on companies whose sole activity in a state is the solicitation for sales of tangible personal property. 15 U.S.C. § 381.

Taxation of Stock Transfers

Congress preempted state taxation of change in beneficial or record ownership of securities when such state taxation was asserted based on the physical location of the agent handling the transfer. 15 U.S.C. § 78bb(d).

Taxation of Satellite Service

Congress prohibited local tax jurisdictions from imposing tax on providers of direct-to-home satellite services. 47 U.S.C. § 251 et seq.

Taxation of Passengers on Motor Carrier

Congress prohibited states from imposing tax on interstate passenger transportation by motor carrier. 49 U.S.C. § 14505.

Taxation of Internet Access

Congress prohibited states from imposing tax on internet access charges. 47 U.S.C. § 151 note.

Mobile Telecommunications Sourcing

Congress established uniform nationwide sourcing rules for state and local taxation of mobile telecommunications services. 4 U.S.C. §§ 116-126.

Each of these statutory provisions reflects a Congressional intent to protect interstate commerce from undue burdens and from discriminatory taxation. Unless the Eleventh Circuit's decision is corrected, each of these statutory provisions could be subject to unexpected litigation seeking to limit the impact of Congressional action by applying the Eleventh Circuit's overly-strict clear statement rule.

In addition to the existing laws identified above, numerous bills are pending in Congress which would be subject to the intense scrutiny of the Eleventh Circuit's clear statement rule. These bills have been drafted with the understanding that it is not necessary for Congress to expressly describe every possible means the states could use to circumvent the purpose of the bill. Without relief from the Eleventh Circuit's holding, the drafting of each of these bills would need to be evaluated.

Legislation has been introduced which seeks to prohibit states from imposing business activity taxes on companies that do not have a certain level of physical presence in the state. Business Activity Simplification Act of 2007, S. 1726, 110th Cong., 1st Sess. (2007).

Legislation has been introduced which seeks to establish standards under which states could require remote sellers to collect sales and use tax on sales into the state and which creates jurisdiction in the Court of Federal Claims to hear certain disputes arising under the legislated standards. Sales Tax Fairness and Simplification Act, S. 34, 110th Cong., 1st Sess. (2007).

Legislation has been introduced which would impose a three-year moratorium on new, discriminatory state or local taxes on cell phone services, property or providers. Cell Phone Tax Moratorium Act of 2007, S. 166, 110th Cong., 1st Sess. (2007).

Legislation has been introduced which would adopt language identical to that of the 4-R Act respecting discrimination against natural gas pipeline property values. The legislation would also create jurisdiction in the district courts to hear disputes. To Prevent Certain Discriminatory Taxation of Natural Gas Pipeline Property, H.R. 2230, 110th Cong., 1st Sess. (2007).

Legislation has been introduced which would authorize the states to provide certain tax incentives to any person for economic development purposes. Economic Development Act of 2007, S. 914, 110th Cong., 1st Sess. (2007).

State discrimination against interstate businesses is a growing problem for businesses struggling to compete in an increasingly competitive global business environment. The result has been an increasing cry for federal legislation establishing uniform rules and protections for commerce among the states. The question raised by the present case is quite simply, how specific does Congress have to be when it legislates to protect interstate commerce from antiquated and discriminatory local tax laws? While that question may not be susceptible to a precise answer, it is perfectly clear that Congress's prohibition on discrimination based on true mar-

ket value is more than specific enough to require a district court to hear evidence relevant to the proper methodology to use in making that valuation.

CONCLUSION

The 4-R Act sets forth prohibitions on discrimination and an avenue for relief in federal court that were intended to relieve railroad property from acts of discriminatory taxation by state and local governments. For Congress' words to have meaning, taxpayers must have the ability to challenge state discrimination whether it is accomplished by tax rate or assessment methodology. To hold otherwise eviscerates the purpose of the 4-R Act and jeopardizes the legitimacy of numerous other federal Acts impacting state and local taxation.

RELIEF REQUESTED

The Council On State Taxation respectfully requests that this Court reverse the decision of the Eleventh Circuit.

Respectfully submitted.

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